2-1-1976

Murray Simmons and Carrie Simmons v. Convenient Industries, Inc.

Appellant's Brief 1976-SC-0014

APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

No. 76-14

MURRAY SIMMONS, and
CARRIE SIMMONS - - - - -**Appellants**

versus

CONVENIENT INDUSTRIES, INC. - - **Appellee**

APPEAL FROM THE JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, THIRD DIVISION
HON. LYNDON SCHMID, JUDGE

BRIEF OF APPELLANTS

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This is to certify that a copy of this Brief of Appellants has been served upon Bill V. Seiller, 2100 Commonwealth Building, Louisville, Kentucky 40202, Counsel for Appellee and upon the Hon. Lyndon Schmid, Trial Judge, pursuant to Rule 1.250 of this court, on the 6 day of February, 1976.

Counsel for Appellant

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STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Trial Court err in its Finding of Facts, Conclusions of Law, and Judgment of November 12, 1975?

2. Did the Court err in its Order of November 12, 1975 allowing Attorney Allen Schmitt $2,000.00 for his Attorney's fees?

3. Did the Court err in not Ordering the Appellee, Convenient Industries, Inc., to board the house?

SUPREME COURT OF KENTUCKY

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BRIEF OF APPELLANTS

May it please the Court:

STATEMENT OF THE CASE

A. Statement of the Nature of Proceedings

The Appellant herein states that this case was originally presented to the Court of Appeals No. V-28-72, and the Honorable Court of Appeals did enter an opinion on May 21, 1974, which did reverse the Jefferson Circuit Court, by saying on page 3:

> "From the record, it seems clear the trial court erred in granting the summary judgment since a genuine issue of fact existed, that being whether or not the appellee acted innocently or in bad faith."

After the case was returned to the Circuit Court, proof was given by the Simmons on February 4, 1975, and by Convenient Industries on March 12, 1975, before the Chancery judge.

After this, the Appellants became dissatisfied with their attorney, Allen Schmitt, over a settlement offer set forth in the November 12 FINDING OF FACTS, and so on April 18, 1975, by motion, Counsel for Appellant was substituted for myself, and further, Allen Schmitt did file a motion and affidavit setting forth his claim for attorney's fees in the amount of $2,500.00.

On November 7, 1975, the Appellant made a motion that the Chancellor require the Appellee, Convenient, to board the house in question; based on an order from the City of Louisville Housing Department, so as to protect the property in question and also to prevent a lien from being placed against the Appellant property owners, which would require additional expense to have it removed. But the Chancellor refused said tendered order.

On November 12, 1974, the Chancellor made his decision, which said:

> "The defendants shall remove the building from the premises located at 1213 Euclid Avenue; restore the land as nearly as possible to its original condition, and restore the fence."
>
> "The Plaintiffs shall recover of the Defendant the sum of $2,500.00 for damages and their costs."

And by separate order the Court allowed Mr. Schmitt a fee of $2,000.00.

On December 11, 1975, the Appellee obtained a restraining order prohibiting the Appellant from interfering with the Appellee's removal of the house in

question. On December 17, 1975, a hearing was held on the Appellant's motion to dissolve the restraining order, since the Appellant had put up a Supersedeas Bond. After the Court had made its decision on the same date, the Appellant and Appellee agreed that the house could be removed and that this honorable court would review the issue of money damages.

From those orders and judgments, the Appellant appeals.

B. Statement of the Facts

The Appellant herein states that the facts of this case are the same as when it was appealed to this Honorable Court the first time. That in a nut shell, the Appellee built a prefab house on the wrong lot, which was owned by the Appellants. The only question is as to damages and that the Appellant contends that they proved punitive damages. But the Chancellor did not award any and that even as actual damages, his award was too low.

ARGUMENT

I. THE COURT ERRED IN ITS FINDING OF FACTS, CONCLUSIONS OF LAW, AND JUDGMENT OF NOVEMBER 12, 1975.

As stated in the first appeal, the Plaintiff had a vacant lot across town from where they live. The Plaintiffs are elderly people, of little means, who do not have an automobile.

The Plaintiffs' testimony was that they occasionally go by the vacant lot in question. They testified that it was on a Sunday, in March of 1971, that they first

noticed that someone was constructing on their property. They testified that they called the building inspector the next day, and found that no building permit had been issued for their lot, 1213 Euclid Avenue. They stated that they went back on Tuesday and found that the building inspector had attached a note on a 2 x 4, which asked those who were building to stop.

The Plaintiffs stated that they went back again by cab, and the note was torn off the 2 x 4, but they never could catch anyone there at the times they went to the lot.

From the TRANSCRIPT OF EVIDENCE, Murray Simmons, p. 6, line 8.

A. Oh, yeah, I finally did talk to someone, yeah.
11. How far was the construction on that location?
A. Well, they had got up, I guess, the foundation.
12. The foundation was in?
A. Yeah.
13. Who did you talk to?
A. Well, just a man working there, and I never could, you know, I asked them about, you know, I told them they was on the wrong lot and I put a sign up, and everytime I'd go back, the sign was torn down."

The sign the Appellant was talking about gave the Appellant's phone number and said "Keep Out."

Page 7, line 8, of Murry Simmons:

18. Did anybody ever call you after the sign was up?
A. Never did.

The Appellant further stated that three times he repaired the chain-link fence around the place to keep

the intruders off, but each time they broke it down and continued building.

The Appellants testified that they had been damaged by having to replace the fence three times at a cost of $400.00. Their land has been adversely used, and immediately prior to this, it had been up for sale for $2,500.00, and they had offers at that price. Further, they stated that they wanted damages in the amount of $20.00 a day for the adverse use of their lot. The Appellants stated that when they first started to complain, only the foundation was complete, and that it took a couple of months to complete the house from that point. That is the reason they were asking for $20.00 a day in compensatory and punitive damages.

The Appellee, Convenient Industries, put on the following witnesses:

Gerald B. Thomas—coordinator of modular units. He stated he did a site inspection, and submitted it to the FHA for approval. He said there was a fence around the Simmons' lot, which he ordered torn down, while the vacant lot, the Appellee's lot next door, had no fence. He further stated that he knew that Convenient's lot was to the East, yet he conveniently went along and built the house on the wrong lot (Transcript 7-10).

He further stated that all his trucks were lettered "Monday Homes," which was not listed in the Louisville phone book, and this confirms the Simmons' story that they never could discover who was building on the lot.

Thomas went on to say that the FHA financing was for $15,650.00, including the lot, and that further, he testified that it would now cost $1,000.00 to $1,200.00 to

move the house on the lot next door, which is owned by the Appellee. He said he saw the Simmons' sign, but only called the phone number once, and got no answer, but his testimony was that the house was 90% completed when he saw the sign. This differed completely from the testimony of the Simmons.

He further testified that he knew how to read a legal description, yet never bothered to check it (Transcript 25-27). Yet he even did not follow the address on the building permit (Transcript, p. 40).

Mr. Catlett testified next, as a person with knowledge of real estate. He testified of the deteriorating condition of the house, over the lapse of time it has been in court, and testified that the rental value of land in that area is 1% of the value of the lot per year. Yet his testimony is riddled with contradictions, for he said the present value is $5,500.00, but it would only take $2,500.00-$3,000.00 to fix it up to a $15,650.00 house.

The Appellants contend that the 1% a month is not the proper figure to be a reasonable rental charge.

The third witness was John Elsner, Corporate Secretary of Convenient Industries, and who added nothing more.

This honorable court did reverse the lower court on the first appeal, so that testimony could be put into the record on punitive damages. The Appellants feel that they should be granted, based on the testimony of the Simmons, punitive damages, yet the court gave the Simmons only $2,500.00, and then gave their counsel, Allen Schmitt, $2,000.00 for attorney's fees, leaving the Appellants $500.00 for their damages, and cost of a second attorney.

LAW

The Appellant has found a similar case to the present situation, which is still the law of this Commonwealth, that is, as stated in *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corp.*, 20 F.2d 67 (1927).

> Page 71: "If a Trespass is wrongful, nothing else appearing, it will be presumed to be wilful. The duty is cast upon the Trespasser to explain his conduct . . ."

In *L. Crain, etc.* v. *John Hargis,* 6 Ky. Opin. 410 (1873).

> "It is immaterial, however, so far as the Appellant's right to recover is concerned, whether the building was placed upon the lot by mistake, or with knowledge that it was the property of Appellant, except on the latter case, no relief would be given by the Chancellor."

And in *Lebow* v. *Cameron,* Ky., 394 S.W.2d 773 (1965), the court said:

> "Wherein it is recognized that the burden is always upon the offender to establish his status of innocence."

In *Weaver* v. *Ficke,* 174 Ky. 432, 192 S.W. 515 (1917), the court said:

> "But it is insisted that the evidence did not authorize a punitive damage instruction as to Weaver. We have frequently written that punitive damages may be recovered where the entry is made maliciously, or in wanton disregard of the Plaintiff's rights. Wilcox vs. Alley, 140 Ky. 187, 130 S.W. 1115; Perciful vs. Coleman, 72 S.W. 29, 24 Ky. Law Rep.

> 1685; Ohio Valley Tel. Co. vs. Meyer, 50 S.W. 673, 22 Ky. Law Rep. 36. It must be remembered that in a case like this malice does not mean mere ill will against a person, but means a wrongful act, intentionally done, without just cause or excuse."

and further as stated in *Zella Mining Co.* v. *Collins,* 203 Ky. 178, 261 S.W. 1090 (1924), *Wilcox* v. *Alley,* 140 Ky. 187, 130 S.W. 1115 (1910), *Kentucky Stove Co.* v. *Page,* 125 S.W. 170 (1910), and *Kentucky Midland Ry. Co.* v. *Stumpt,* 12 Ky. Law Rep. 316 (1890).

Under Kentucky law, it is clear the Defendant, Convenient, is entitled to no damages (as stated in their counterclaim) for building a house on the wrong land, nor for enhancing it:

> "As a general rule, no right can be imitated by means of a trespass for the Trespasser can acquire no rights for his tortious acts", Kentucky Electric Power Co. vs. Norton Coal Mining Co., 93 F.2d 967 (6th Cir. 1938).

In *Louisville Builders Supply Co.* v. *City of Richlawn,* Ky., 392 S.W.2d 438 (1965), the Court said:

> "The Chancellor found that the land in question belonged to Richlawn, and the removal of the trees was accomplished in wanton and wilful disregard of the rights of Richlawn. Since the evidence justified these findings, punitive damages were properly assessed."

Bender v. *Eaton,* Ky., 343 S.W.2d 799 (1961).

> "measured by a reasonable rental value of the property for the period of time it was wrongfully withheld."

The Law as to damages has been set forth in *Hughett* v. *Caldwell County,* 313 Ky. 85, 230 S.W.2d 92, 21 ALR2d 373 (1950).

> "Where there is a total loss of property, the total reasonable value to the owner is the measure of damages."

Further, the Appellant wishes to point out to this Court KRS 454.040 Trespass, joint or several, damages for, and the case of *Price* v. *Dickson,* Ky., 317 S.W.2d 156 (1958) wherein this court said:

> "Also discomfort caused by this type of injury may be considered as an element of damages."

II. THE COURT ERRED IN ITS ORDER OF NOVEMBER 12, 1975 ALLOWING ATTORNEY ALLEN SCHMITT $2,000.00 FOR HIS ATTORNEY'S FEES.

It is true that an attorney has a right by common law (American) and by KRS 30.200 to a lien for his reasonable attorney fees.

But this appeal is questioning an award of $2,000.00 in legal fees out of only a $2,500.00 judgment. This amounts to an 80% fee to Attorney Schmitt and 20% for the client. It is an unconscionable amount that is not charged by practicing attorneys and is in violation of the contingent fee contract of 1/3 entered into between the Simmons and attorney Allen Schmitt before suit was prosecuted.

On this same basis, I as a second attorney, would be better off not continuing my services with the Simmons, having them hire a third attorney, then I could proceed to file an affidavit with the court and have it award me a

fee which would be higher than my contingent fee of 1/3 of the remaining $500.00.

The United States Supreme Court recently stated in *Goldfarb* v. *Virginia State Bar,* 44 L.Ed.2d 572, 95 S.Ct. 2004, 419 U.S. 991, 1103 (1975), that lawyers were to be treated as any other type of business.

Starting with *Chreste* v. *Louisville Ry. Co.,* 167 Ky. 75, 180 S.W. 49, L.R.A. 1917B, 1123, Ann. Cas. 1917 C, 867 (1915) the Court of Appeals said:

> "Such a (contingent fee) contract will be enforced, unless champertous or contrary to public policy . . ."

This case was restated again in *Army* v. *Johnson,* Ky., 443 S.W.2d 543 (1969).

The Court of Appeals has upheld the contingent fee contract as the controlling fee in *Skinner* v. *Morrow,* Ky., 318 S.W.2d 419 (1958).

> "(Mr. Wilbur Fields) had contingent fee contract with the four paternal heirs. One contract calls for a 25 per cent fee, two of them for a 33-1/3 per cent fee, and one for such fee as the court should award.
>
> The circuit Court, with respect to the latter contract, determined that a 33-1/3 per cent fee would be proper . . ."

Surely an 80% fee must be taken as excessive in light of what lawyers charge in this community.

And in one of the latest cases the Court of Appeals said in *First National Bank of Louisville* v. *Progressive Casualty Ins. Co.,* Ky., 517 S.W.2d 226 (1974):

> "Cf. KRS 372.060. An agreement to measure an attorney's fee by the value of what is recovered is

valid only upon the theory that the client "is not to give a part or profit of the thing in contest."

And in *Stubblefield* v. *Stubblefield*, Ky., 327 S.W.2d 24 (1959) the Court of Appeals said:

"The amount of labor, time and trouble involved is only one of the considerations. In addition, we must consider the importance of the litigation, the skill required, the value of the property in controversy, and the results secured."

13 ALR3d 675 (1967) Attorneys-Contingent Fee Contract:

"In the absence of an express provision to the contrary, services rendered by the attorney in prosecuting or defending an appeal from a judgment in the case for which he was employed are held to be covered by a contingent fee contract, and the attorney is not entitled to any additional compensation for such services . . ."

Further see:

Attorney's Fees in Real Estate Matters
58 ALR3d 201 (1974)
Attorney's Compensation-Amount
56 ALR2d 13 (1957)
Canon 2 of the Code of Professional Responsibility

III. THE COURT ERRED IN NOT ORDERING THE APPELLEE, CONVENIENT INDUSTRIES, INC. TO BOARD THE HOUSE.

This argument is now moot, since the house has been removed.

CONCLUSION

This is a case where the Appellants were poor, innocent people just stepped on and squashed into the ground by the big corporation, Convenient Industries. They protested that the house was being built on the wrong lot, yet Convenient went ahead and continued to build. When Convenient Industries testified in court, they even admitted their wrongful actions,

> P. 44 Mr. Thomas - Cross
>
> 161 Did you indicate to him that you had some difference of opinion as to where these stakes should be?
>
> A. I indicated to him at that time,"Are you certain you got the right lot?" and he said, "I staked the lot according to the legal description."
>
> 162 But you never did take it up with the engineer himself before going back over and starting your work?
>
> A No, I did not.

Because of the nature of Convenient's indifference, the Court should have awarded punitive damages, and should have taken the other factors in the case into consideration and not awarded such a high attorney fee.

Respectfully submitted,

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